ORAL ARGUMENT NOT YET SCHEDULED
Case Nos. 18-1091 and 18-1153

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**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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First Student, Inc., a Division of First Group America
Petitioner/Cross-Respondent

v.

National Labor Relations Board
Respondent/Cross-Petitioner

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United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, Local 9036
Intervenor

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ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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# BRIEF OF PETITIONER/CROSS-RESPONDENT FIRST STUDENT, INC.

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David A. Kadela (D.C. Cir. No. 53959)
Erik Hult
Littler Mendelson, P.C.
21 E. State St., Suite 1600
Columbus, OH 43215
Telephone: 614.463.4201
Facsimile: 614.221.3301
dkadela@littler.com
ehult@littler.com

*Attorneys for Petitioner/Cross-Respondent First Student, Inc.*

## CERTIFICATE AS TO PARTIES, RULINGS, RELATED CASES

### A. Parties and Amici

The parties to the National Labor Relations Board proceeding that is involved in this case were: First Student, Inc. ("First Student" or the "Company"), as respondent; Local 9036, United Steel, Paper and Forestry, Rubber, Manufacturing, energy, Allied Industrial and Service Workers International Union (USW) AFL-CIO (the "Union"), as charging party; and the General Counsel of the National Labor Relations Board.

The parties to this case are Petitioner/Cross Respondent First Student, and Respondent/Cross-Petitioner National Labor Relations Board ("NLRB" or the "Board"). On July 23, 2018, the Court issued an order granting a motion filed by the Union to participate in the case as an intervenor.

### B. Rulings Under Review

First Student has petitioned the Court for review of the Board's Decision in NLRB Case No. 07-CA-092212, which was issued on February 6, 2018, and is reported at 366 NLRB No. 13.

### C. Related Cases

This case was previously before the Court on a petition for review First Student filed on February 16, 2018, which was docketed as Case No. 18-1047. On May 31, 2018, the Court issued an order dismissing Case No. 18-1047, on an unopposed motion to voluntarily dismiss the case, which First Student filed after

receiving an order from the Court on April 13, 2018, to show cause why the petition for review was not incurably premature. Consolidated Case No. 18-1091 is a related case that was filed by the Board on April 3, 2018, as a cross-application for enforcement of the decision under review.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, First Student, Inc. states that it is a wholly owned subsidiary of FirstGroup America Holdings, Inc., which is a wholly owned subsidiary of Laidlaw Transportation, Inc., which is a wholly owned subsidiary of First Group International, Inc., which is an indirect, wholly owned subsidiary of FirstGroup, America, Inc., which is an indirect, wholly owned subsidiary of FirstGroup PLC, which is publicly traded on the London Stock Exchange. No other publicly held corporation owns 10% or more of First Student, Inc.'s or FirstGroup America, Inc.'s stock.

Dated: November 5, 2018

Respectfully submitted,

*/s/ David A. Kadela*

David A. Kadela (D.C. Cir. No. 53959)
Erik Hult
Littler Mendelson, P.C.
21 E. State St., Suite 1600
Columbus, OH 43215
Telephone: 614.463.4201
Facsimile: 614.221.3301
dkadela@littler.com
ehult@littler.com

*Attorneys for Petitioner/Cross Respondent First Student, Inc.*

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## GLOSSARY OF ABBREVIATIONS

| Abbreviation | Definition |
|---|---|
| The Act or NLRA | National Labor Relations Act |
| The ALJ | Administrative Law Judge Mark Carissimi |
| The Board or NLRB | National Labor Relations Board |
| General Counsel | The Board's General Counsel and trial attorneys |
| First Student or the Company | First Student, Inc. |
| The Union | Local 9036, United Steel, Paper and Forestry, Rubber, Manufacturing, energy, Allied Industrial and Service Workers International Union (USW) AFL-CIO |
| The District | Saginaw, Michigan School District |
| The Board of Education | Saginaw, Michigan School District Board of Education |
| The District CBA | The Collective-Bargaining Agreement between the Union and the District's Board of Education |
| The Board's Decision or Board Decision | The Decision and Order of the Board under review |
| Tr. | Hearing Transcript |
| CEX | Company Exhibit |
| GCX | General Counsel Exhibit |
| UEX | Union Exhibit |

## I. JURISDICTIONAL STATEMENT

The Board had subject matter jurisdiction over the NLRB case under Section 10(a) of the NLRA, 29 U.S.C. § 160(a). The Court has jurisdiction over First Student's Petition for Review under Section 10(f), 29 U.S.C. § 160 (f), and over the Board's Cross-Application for Enforcement under Section 10(e), 29 U.S.C. § 160(e).

## II. STATEMENT OF THE ISSUES PRESENTED

1. Whether the factual findings upon which the Board based its holding that First Student was a "perfectly clear successor" are not supported by substantial evidence on the record considered as a whole.

2. Whether in holding First Student was a "perfectly clear successor," the Board misinterpreted the Act, and misapplied, deviated without rational explanation from, and ignored Supreme Court, Court of Appeals, and Board precedent.

## III. STATUTES

### A. Sections 8(a)(1) and (5) of the NLRA, 29 U.S.C. § 158(a)(1) and (5)

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

## IV. STATEMENT OF THE CASE

### A. Background

Headquartered in Cincinnati, Ohio, First Student is the largest provider of school transportation services in North America. In Michigan, the Company provides transportation services in 18 school districts and operates just under 1,000 buses. (Tr. 449). This case involves a labor dispute over whether, under Supreme Court, Court of Appeals and Board precedent, First Student, an acknowledged successor, (1) became a perfectly clear successor of the Saginaw, Michigan School District before the Company entered into a school bus transportation contract with the District, and (2) remained one when, on the day after the contract was approved by the Board of Education, the Company unilaterally announced terms and conditions under which it would offer employment to the District's Union-represented bus drivers and monitors upon inviting them to apply for employment.

### B. Timeline Leading To And Following First Student's Entering Into A School Bus Transportation Contract With The District

In mid-June 2011, First Student received a "Request for Proposal" ("RFP") from the District seeking a proposal to replace the District as the transportation services provider for the District's students. The Company submitted its response to the RFP in July 2011. In late July, the Company was interviewed by the District, as were two other companies that had submitted proposals. (Tr. 375-77,

450-53). On October 12, 2011, the Board of Education voted to approve the District's entering into a transportation services contract with First Student. Less than a month later, however, the Superintendent of Schools for the District withdrew the RFP, ending the process. (Tr. 378-80, 454-55; REX 7).

In January 2012, the District and First Student revisited entering into a transportation services contract. On February 3, 2012, the Company submitted a revised proposal. (Tr. 381-82; 455-57; GCX 20). Over the next three months, the District and First Student negotiated over contract terms.

While the negotiations were ongoing, the Dr. Kelley Peatross, the District's Assistant Superintendent of Schools, arranged for two representatives of First Student, Area General Manager Doug Meek and Business Development Manager Dan Kinsley, to meet with the District's Union-represented employees to provide them information on the Company. The meeting was held on March 2, 2012, in the break room of the District's transportation facility. All of the District's drivers and monitors were invited and around 40 attended. (Tr. 382-84, 400-02, 417-22, 458-60). Six witnesses testified on what they recalled about the meeting, including Meek, Kinsley, Peatross and Robert Bradley, the manager of the contractor to which the District had contracted out its custodial and maintenance services. The ALJ credited the testimony of Meek, finding it was detailed and consistent and corroborated in relevant part by the testimony of Kinsley, Peatross and Bradley. In his analysis of the perfectly clear successor issue, the ALJ summarized the relevant

aspects of the testimony he credited on what Meek communicated to the employees at the meeting, as follows:

> [A]t this meeting the Respondent, through Meek, notified the employees that they would be receiving an application form at a future meeting if a contract was reached between the Respondent and the School District. Meek indicated that after the completion of the application and a necessary background check, applicants would be subject to a preemployment drug screen, a physical examination and receive training. Meek further stated that after completion of these requirements the Respondent would offer employment to existing employees who met its criteria.
>
> In response to a question from an employee regarding how many employees would be hired by the Respondent, Meek indicated that in a conversion between a public school transportation system and the Respondent's operation, the Respondent typically hired 80 to 90 percent of the existing work force. Meek further stated that if the employees are represented and the Respondent hired 51 percent of the existing work force as its own, the employees would bring their representation with them and a new contract would be negotiated.
>
> Meek stated that the Respondent did not know how many hours would be guaranteed to employees but that it would know more when the routes were established. In response to questions regarding under what conditions the employees would work if hired by the Respondent, Meek stated that those issues would be subject to negotiations.

366 NLRB No. 13, p.19.[1]

In the first half of May 2012, First Student and the District reached an

[1] Peatross testified, similar to Meek, that she informed the employees at the meeting that First Student would recognize the Union if it hired 50% plus one of the current workforce. (Tr. 359-62, 382-84). Bradley recalled her adding that, in that event, the Union would have to negotiate a new contract with First Student. Kinsley recalled Peatross' saying that if the District entered into a contract with First Student, the District CBA would be "null and void." (Tr. 460). Meek's memory was that Peatross told the employees that First Student would be a new employer and, if hired, the employees would work under the Company's work rules. (Tr. 422).

agreement in principle on terms for the Company to become the District's transportation provider, beginning with the 2012-2013 school year. The agreement was contingent on Board of Education approval. (Tr. 382; 457-58, 461).

At a public meeting on May 16, 2012, the Board of Education voted to approve the District's entering into the transportation services contract with First Student, effective July 1, 2012. Kinsley attended and spoke at the meeting. Also in attendance at the meeting were Peatross, Bradley, Union Representative Tonya DeVore and around five Union-represented employees. After the meeting, Kinsley had a brief conversation with DeVore and the employees. Bradley overheard a part of it. Crediting the testimony of Kinsley, Peatross and Bradley, the ALJ found that, when he spoke at the meeting:

> Kinsley stated that the Respondent would hire School District employees if they submitted applications and met the Respondent's hiring criteria which included a background check, a drug screen, an interview, and dexterity tests. Kinsley also indicated that the Respondent would hire the current School District employees at the same rate of pay and that the Respondent would recognize the Union if it hired 51 percent or more of the existing work force.

366 NLRB No. 13, p. 19. The ALJ credited the testimony of Kinsley and Bradley on what was said during Kinsley's brief conversation with DaVore and the employees after the meeting, finding that:

> Kinsley stated that it was the Respondent's goal to hire as many of the School District's employees as it could which met its hiring criteria. Kinsley acknowledged to DeVore that it would be more accurate for him to say that the Respondent would recognize the Union if it hired 50 percent plus one of the existing work force. He also repeated that if

> employees met the Respondent's hiring criteria their wages would be maintained.

366 NLRB No. 13, p.19.

The Superintendent of Schools signed the transportation services contract on behalf of the District on May 24, 2012. First Student's President signed the contract on June 1, 2012. (Tr. 384-86, 402-03, 462-65; GCX 17).

On May 17, 2012, representatives of First Student met with the District's Union-represented employees. The representatives reviewed the requirements the employees would have to satisfy to receive an offer of employment, provided the employees with an outline of terms and conditions under which they would work if hired, and made employment applications available to the employees. Thereafter, District employees, along with external candidates, submitted applications for employment and went through the hiring process. First Student required the District's employees to submit applications by May 23, 2012, to retain, if they were hired, their seniority and wage rate. As a condition of receiving an offer of employment, applicants were required to pass background checks, training requirements, a physical exam, a drug test, a dexterity test, and classroom and behind-the-wheel evaluations. (Tr. 423-25, 501-10; GCX 5).

First Student extended its first two offers of employment to former District employees on June 27, 2012, and the majority of its offers to them on August 1, 2012. (REX 6). As of August 17, 2012, the Company had hired a majority of the

employees it needed. By August 27, 2012, the first day of work for employees, the Company had retained just short of a full complement of employees. (Tr. 388, 516; REX 6, 12). A majority of those employees had previously been employed by the District and as District employees, they had worked under the District CBA. (REX 12; GCX 2).

Over the course of several weeks beginning in mid-September 2012, First Student, acknowledging it was the District's successor, had discussions with the Union on scheduling collective bargaining negotiations. Eventually, the Company and the Union agreed to hold their first bargaining session on October 17, 2012. In the process, the Union inquired if the Company would agree to maintain, pending negotiation of an agreement, the terms and conditions under which the employees worked for the District. First Student responded that it was under no obligation to do so. (GCX 16).

This case is about whether First Student was right in taking that position, i.e., whether the Company had the right at its May 17, 2012, meeting with the District's employees to establish initial terms and conditions under which it would offer the employees employment, or had forfeited that right by engaging in conduct prior to that meeting to cause it to become a perfectly clear successor.

### C. Proceedings Before The NLRB

On October 29, 2012 the Union filed an unfair labor practice charge with Region 7 of the Board that alleged First Student breached bargaining-related

obligations it owed the Union as a purported perfectly clear successor. (GCX 1(a)). On April 30, 2013, the General Counsel issued a complaint on the charge, alleging, among other things, that at the meeting with the District's employees on May 17, 2012, the Company, bypassing the Union and dealing directly with the employees, violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5), by implementing changes to the terms and conditions of employment the District previously had in place, without affording the Union an opportunity to bargain over the changes. (GCX 1(c)).[2]

A hearing on the complaint was held on July 24, 25 and 26, 2013, in Saginaw, Michigan. On December 13, 2013, the ALJ issued a decision finding, among other things, that First Student was not a perfectly clear successor and dismissing, based upon that finding, the claims that the Company violated the Act by bypassing the Union and unilaterally announcing initial terms and conditions of employment for the bargaining unit employees at the meeting on May 17, 2012.

The ALJ found that under the test adopted by the Board in *Spruce Up Corp*., 209 NLRB 194 (1974), enfd. per curiam, 529 F.2d 516 (4th Cir. 1975), First Student was not a perfectly clear successor because at the May 17 meeting the

[2] The complaint also alleged three other claims that are not at issue in this appeal; namely, that First Student unlawfully (1) implemented a new attendance policy in late August and early September 2012, after commencing operations, (2) delayed bargaining with the Union for two months, from August 17 to October 17, 2012, and (3) conditioned the commencement of bargaining on the Union's withdrawal of a previous unfair labor practice charge it had filed. (GCX 1(c)).

Company communicated, simultaneously with inviting employees to apply for a job and substantially before it commenced operations, new terms of employment. He reasoned:

> The Respondent's clear and unequivocal announcement of the conditions upon which it invited employees to apply for jobs with it occurred while the unit employees were still employed by the School District, as it was before the school year ended at the end of June 2012. It also occurred before the contract between the School District and the Respondent had actually been signed and before its effective date of July 1. The May 17 meeting occurred over 3 months before the Respondent would begin to actually provide school transportation services. Thus, the Respondent clearly and unequivocally announced new terms of employment substantially before it commenced operations. As in *Spruce Up,* the Respondent announced these terms simultaneously with offering employees an application to apply for work under those terms. Under these circumstances, I find that the Respondent did not "either actively or, by tacit inference, mislead employees into believing they would all be retained without change in their wages, hours or conditions of employment" under the standard set forth by the Board in *Spruce Up*, at 195. If employees were unclear about what terms and conditions of employment the Respondent was offering before May 17, 2012, there could be no doubt of what those terms were after the Respondent distributed its May 17 2012 memo.

366 NLRB No. 13 at p.20.

Rejecting the General Counsel's and Union's contentions that the information Meek communicated to the District employees at the March 2, 2012, meeting caused First Student to become a perfectly clear successor, the ALJ found that, to the contrary, what Meek told the employees indicated that the Company would not be adopting the School District's collective-bargaining agreement and that new working conditions would be implemented. He based that conclusion on

the facts that:

> [T]he Respondent . . . indicated that, if it did recognize the Union, a new contract would be negotiated. The Respondent indicated it did not know how many hours would be worked by employees. The Respondent stated that employees would retain their rate of pay but, when asked about issues such as paid time off vacation pay and sick pay, the Respondent indicated those issues would be subject to negotiations.

On February 24, 2014, the Union filed exceptions, and on March 10, 2014, the General Counsel filed cross-exceptions to, among others, the findings upon which the ALJ based his dismissal of the perfectly clear successor-based unilateral change and direct dealing claims.

On February 6, 2018, the Board, in a 2 to 1 decision, with Member Kaplan dissenting, reversed the ALJ's determination that First Student was not a perfectly clear successor. The Board found that First Student triggered perfectly clear successor status over two months before the May 17, 2012, meeting, at the meeting with District employees on March 2, 2012. According to the Board, the Company became a perfectly clear successor at that meeting when its representatives (1) expressed an intent to, if the Company were awarded a contract, retain employees who completed applications and met the Company's hiring criteria, but (2) failed clearly to announce the Company intended to establish new terms and conditions of employment. 366 NLRB No. 13 at pp.3-4.

The Board, however, hedged that if it were wrong and a perfectly clear successor-based bargaining obligation could not have arisen until after the Board

of Education approved the District's contract with First Student, such an obligation would have attached after the board voted to approve the contract on May 16, 2012. The reason, said the Board, was that after the vote, First Student reiterated its intent to retain employees who met its hiring criteria without announcing it intended to establish new employment terms. 366 NLRB No. 13 at p.4, n.13.

Lastly, the Board found the ALJ erred in finding that First Student timely exercised its right unilaterally to establish initial terms and conditions of employment at the meeting with the District's employees on May 17, 2012, stating:

> The Board has consistently held that a subsequent announcement of new terms, even if made before formal offers of employment are extended, or before the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms.

366 NLRB No. 13, p.4.

Based upon its finding First Student was a perfectly clear successor, the Board held the Company violated Section 8(a)(5) and (1) of the NLRA by "failing to provide the Union with notice and an opportunity to bargain before imposing initial terms and conditions of employment for unit employees." 366 NLRB No. 13, p.6.

On March 6, 2018, First Student filed a motion for reconsideration asking the Board to reconsider its Decision. The Board summarily denied the motion on

March 29, 2018.

## I. SUMMARY OF ARGUMENT

1. The Board's finding that First Student became a perfectly clear successor before it entered into a contract with the District misinterprets the Act and deviates without rational explanation from, Board precedent indicating that a prospective successor cannot become a perfectly clear successor based upon information it communicates to the employees of the prospective predecessor or their union representative prior to entering into a contract to acquire or assume the prospective predecessor's business operations. *See, e.g., Morris Healthcare & Rehab Center, LLC,* 348 NLRB 1360, 1367 (2006); *Hilton Environmental,* 320 NLRB 437 (1995); *Fremont Ford,* 289 NLRB 1290, 1993-1994 (1988).

2. The Board's Findings that statements made by First Student at the March 2, 2012, meeting with the District's employees or alternatively before and after the March 16, 2012, Board Of Education meeting caused the Company to become a perfectly clear successor are not supported by substantial evidence and deviate without justification from court and board precedent, including the Supreme Court's decision in *NLRB v. Burns Int'l Security Services,* 406 U.S. 272 (1972), this Court's decision in *S&F Market Street Healthcare LLC v. NLRB,* 570 F.3d 354 (D.C. Cir. 2009), the Second Circuit's decision in *Nazareth Regional High School v. NLRB,* 549 F.2d 873 (2d Cir. 1976), and the Board's decisions in

*Marriott Management Services, Inc.,* 318 NLRB 144 (1995), and *Banknote Corp. of America,* 315 NLRB 1041, 1043 (1994), enfd. 84 F.3d 637 (2d Cir. 1996).

3. The Board's finding that once First Student's perfectly clear successor status attached, the Company could not vitiate that status by communicating at the meeting on May 17, 2012, the initial terms under which it would employ the District's employees misinterprets and deviates without rational explanation from the second prong of the *Spruce Up* under which a successor may avoid perfectly clear successor status by clearly announcing an intent to establish new employment terms prior to inviting the predecessor's employees to apply for employment.

## II. STANDING

As the party aggrieved, DHL has standing under Section 10(f) of the Act, 29 U.S.C. § 160(f), to petition the Court to review and set aside the Board's Decision.

## V. ARGUMENT

### A. Standard Of Review

The Board is responsible for "applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation v. NLRB,* 324 U.S. 793, 798 (1945). The responsibility carries with it "authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 501 (1978). The question for a court if the statute is silent or ambiguous on an issue is "whether the agency's answer is based on a permissible construction of the

statute." *Chevron, U.S.A. v. NRDC, Inc.,* 467 U.S. 837, 843 (1984).

Absent a binding judicial construction of the meaning of a provision of the Act, a court must assess whether the Board's interpretation is reasonable and therefore entitled to deference. *ITT Industries, Inc. v. NLRB,* 252 F.3d 995, 1004 (D.C. Cir. 2001). In assessing the reasonableness of the Board's interpretation, "a reviewing court must determine both whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether 'the agency considered the matter in a detailed and reasoned fashion.'" *Rettig v. Pension Benefit Guar. Corp.,* 744 F.2d 133, 151 (D.C. Cir. 1984) (quoting *Chevron,* 467 U.S. at 865). It is incumbent upon the Board, either in the case under scrutiny or at some other point in time, to have engaged in a considered analysis and offered a reasoned explanation for the interpretation it has adopted. *ITT Industries,* 251 F.3d at 1004; *see also, ITT Industries, Inc. v. NLRB,* 413 F.3d 64, 69-70 (D.C. Cir. 2005).

The Board's interpretation is normally entitled to judicial deference. Its decision will be overturned, however, if "the Board's factual findings are not supported by substantial evidence, or the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Cmty. Hosp. of Cent. Cal. v. NLRB,* 335 F.3d 1079, 1082-83 (D.C. Cir. 2003). An agency acts arbitrarily where it departs from established precedent without a reasoned explanation. *ANR Pipeline Co. v. FERC,* 315 U.S. App. D.C. 189, 71 F.3d 897, 901 (D.C. Cir. 1995). The

Board, thus, cannot "ignore its own relevant precedent but must explain why it is not controlling." *BB&L, Inc. v. NLRB,* 311 U.S. App. D.C. 217, 52 F.3d 366, 369 (D.C. Cir. 1995).

Judicial deference to the Board's interpretation of a provision of the Act is not required if the interpretation conflicts with how the courts have interpreted the provision. *ITT Industries, Inc. v. NLRB,* 252 F.3d 995, 1000 (D.C. Cir. 2001).

### B. The Perfectly Clear Successor Caveat And The Board's Longstanding Interpretation Of It

The perfectly clear successor caveat is derived from the Supreme Court's decision in *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972). *Burns* established the principle that a successor which continues its predecessor's business substantially unchanged, and a majority of whose workforce consists of union-represented employees of the predecessor, inherits a duty to recognize and bargain with the employees' union representative but, absent an agreement to do so, is not obligated to accept its predecessor's labor agreement. Before the duty arises, a successor has the right unilaterally to establish the terms under which it offers employment to prospective employees. As the Supreme Court said in making this point:

> Although Burns had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so, this case is not like a § 8 (a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative. It is difficult to understand how Burns could be said to have *changed* unilaterally any

> pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed *its* terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.

406 U.S. at 294 (emphasis in original).

The perfectly clear caveat comes from the Supreme Court's discussion of that right in *Burns*:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. § 159(a).

406 U.S. at 294-295.

In *Spruce Up Corp.,* 209 NLRB 194, (1974), enfd., 529 F.2d 516 (4th Cir. 1975), the Board addressed the circumstances under which the perfectly clear caveat applies. The Board began with an assessment of what the Court meant when it said the caveat would apply to a successor that "plans to retain all of the employees in the unit," saying:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one….

209 NLRB at 195. The Board next identified policy considerations that demonstrated interpreting the caveat to apply to a successor that makes a pre-hire announcement of new terms would be contrary to the purposes of the Act and, in particular, discourage continuity in employment relationships:

> [A]n employer desirous of availing himself of the *Burns* right to set initial terms would . . . have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme court attaches great importance in *Burns*. And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent.

*Id.* The Board then announced a legal standard that has stood the test of time:

> We believe the caveat in *Burns*, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer ... has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

*Id*.

### C. The Board's Decision Must Be Vacated Because The Board Misinterpreted The Act And Deviated Without Explanation From Its Own Precedent In Finding First Student Became A Perfectly Clear Successor Before It Entered Into A Contract With The District

In its answering briefs to the Union's the General Counsel's exceptions, First Student argued no room exists under *Spruce Up* or any other Board decision to interpret the Act to permit the Company to be deemed a perfectly clear successor based upon statements it made to the District's employees before it entered into a contract with the District. Although the Board has never interpreted the Act to allow for perfectly clear successor status to be imposed before a prospective successor enters into an agreement to acquire or assume a prospective predecessor's business operations, the Board gave the Company's argument short shrift. In a footnote, the Board answered the argument with a conclusion, not the considered analysis and reasoned explanation for which the issue called. *ITT Industries,* 251 F.3d at 1004; *ITT Industries,* 413 F.3d at 69-70; *New York New York,* 313 F.3d at 588 (D.C. Cir. 2002). The Board stated, "Contrary to the Respondent's argument in its answering brief, there is no impediment to holding that the Respondent's bargaining obligation attached on March 2, notwithstanding that the transportation services contract between the Respondent and the School District was not approved until months later." 366 NLRB No. 13, pp.4-5, fn.13. The Board cited three cases ostensibly as support that conclusion, *Nexeo Solutions, LLC*, 364 NLRB No. 44 (2016), *Elf Atochem North America, Inc*., 339 NLRB 796

(2003), and *Spitzer Akron, Inc. v. NLRB,* 540 F.2d 841, 843–845 (6th Cir. 1976). None of these cases addressed the issue whether perfectly clear successor status can attach before a contract is entered.

In *Nexeo*, the Board found that information the predecessor communicated to its employees two days after the purchase agreement was executed resulted in the successor's becoming a perfectly clear successor. 364 NLRB No. 44, p.7. In *Alf Atochem,* the ALJ, in a portion of the decision adopted by two of the three Board members, arrived at a similar result, finding that information communicated to bargaining unit employees shortly after the purchase agreement had been entered made the successor a perfectly clear successor. 339 NLRB at 807-08. This principle is also reflected in the Board's earlier decision in *Spitzer Akron, Inc.,* 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. den. 429 U.S. 1040 (1977). There, before the successor entered into an agreement to purchase the assets of a car dealership, the successor's owner made a statement to one of the predecessor's employees that he wanted "every man to stay on the job and we will carry on as usual." 219 NLRB at 22. After that, on the same day the respondent entered into an agreement to purchase the assets, the successor's owner gave various assurances to the predecessor's employees that they would be retained. The Board held that those assurances, not the statement the owner made before the agreement was executed, sufficed to make the successor a perfectly clear successor. 219 NLRB 23.

Effectively acknowledging that these cases provide no support for the conclusion for which it cited them, the Board conceded it might be wrong that a bargaining obligation arose before First Student's contract was approved, stating that, if it were wrong, it would nonetheless find the obligation arose on May 16, 2012, based upon what Kinsley said at and after the Board of Education meeting. 366 NLRB No. 13, pp.4-5, fn.13. That confession makes inexplicable the Board's failure to analyze the issue and to offer an explanation for interpreting the Act to allow for perfectly clear successor status to attach based upon pre-contract communications. In avoiding the issue, the Board also missed that its alternative finding – that perfectly clear successor status attached on May 16, 2012 – presents the same problem. The Superintendent of Schools did not sign the transportation services agreement until May 24, 2012, and First Student's President did not sign it until June 1, 2012. (Tr. 384-86, 402-03, 462-65; GCX 17).

In paying little heed to First Student's argument that a contract is a prerequisite to a finding of perfectly clear successor status, the Board avoided confronting the Company's contention that this case is not materially different from ones in which a prospective successor's pre-contract communications were not found to trigger perfectly clear successor status. *Spitzer* is one such case. Another is *Fremont Ford,* 289 NLRB 1290 (1988).

In *Fremont Ford,* the Board determined that the respondent, a car dealership, could not be found to be a successor before it had a written agreement to acquire

the dealership. 289 NLRB at 1293-94. The Board likewise found that a demand for recognition the union made before the respondent was either legally or functionally operational did not trigger an obligation on the part of the respondent to bargain with the union. 289 NLRB at 1295.[3]

The Board engaged in a similar analysis in *Hilton's Environmental,* 320 NLRB 437 (1995). In that case, the respondent was awarded a food service contract at an army base, replacing a contractor whose employees had union representation. The Board held the respondent became a perfectly clear successor subsequent to its being awarded the contract, but before commencing operations. In arriving at that result, the Board noted that the respondent had engaged in a course of dealing with the predecessor's employees that led them to believe it would retain them, including requesting letters of intent from them before it was awarded the contract indicating that they would work for it.

*Morris Healthcare & Rehab Center, LLC,* 348 NLRB 1360 (2006), is also instructive. There, the respondent, a nursing home operator that assumed operation of a nursing home from a country board, was held to be a perfectly clear successor because at the time it hired the predecessor's employees it did not inform them what the terms and conditions of their employment would be. What makes the case

[3] Those findings, however, did not save the respondent from being held to be a perfectly clear successor. The Board found that statements the respondent made to the union and employees after it entered into an agreement to purchase the dealership but before it commenced operations brought it within the exception. 289 NLRB at 1297.

noteworthy is that before the respondent entered into a contract with the county board, the respondent's CEO made statements at a public board meeting and on a radio program to the effect that he "wanted a smooth transition and planned to rehire most of the nursing staff, except a few with absenteeism problems." 348 NLRB at 1362-63. The ALJ, whose decision was adopted by the Board, did not base his finding respondent was a perfectly clear successor on that evidence. 348 NLRB at 1363-64, 1367.

These cases teach that, by its terms, application of the perfectly clear successor test adopted in *Spruce Up* turns upon a prospective successor first becoming a successor. In other words, a successor cannot become a perfectly clear successor until sometime after it enters into a contract to acquire or assume the business of its predecessor. Until then, it cannot be perfectly clear that a prospective successor will be in a position to hire anyone. Here, what happened in October 2011 demonstrates why the Act must be interpreted this way – the Board of Education voted to approve the District's entering into a contract with First Student, but before a contract was executed, the Superintendent decided not to enter into one. (Tr. 378-80, 454-55; REX 7). There is no reason that could not have happened again in May 2012. Until the District and First Student executed a contract, either side could have backed out. In other words, until a contract was executed, it was not clear, let alone perfectly clear, that First Student would become the District's transportation provider and be hiring anyone.

Because the Board's finding First Student became a perfectly clear successor before it entered into a contract with the District misinterprets the Act and deviates without explanation from Board precedent, the Board's Decision must be vacated.

### D. The Board's Decision Must Be Vacated Because The Board's Findings That Statements Made By First Student At The March 2, 2012, Meeting With The District's Employees Or Alternatively Before And After The March 16, 2012, Board Of Education Meeting Caused The Company To Become A Perfectly Clear Successor Are Not Supported By Substantial Evidence And Deviate Without Justification From Court And Board Precedent

The legal standard by which the Board assessed whether First Student was a perfectly clear successor was not the one adopted in *Spruce Up*. It was a reengineered test that the Board most recently announced in *Nexeo* and described here as being derived from cases subsequent to *Spruce Up* that "more specifically defined the parameters of the 'perfectly clear' exception with respect to the timing and clarity of the announcement of new terms of employment." 366 NLRB No. 13, p.3. The Board quoted the following passage from *Nexeo* to explain how those "cases" changed things:

> [T]he Board clarified that the exception is not limited to situations where the successor fails to announce initial terms before extending a formal invitation to the predecessor's employees to accept employment. Rather, the bargaining obligation attaches when a successor expresses an intent to retain the predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms. *Canteen Co.,* 317 NLRB 1052, 1053–1054 (1995) enfd. 103 F.3d 1355 (7th Cir. 1997). To avoid "perfectly clear" successor status, a new employer must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its

> expression of intent to retain the predecessor's employees. *Spruce Up,* 209 NLRB at 195; *Canteen*, 317 NLRB at 1052–1054.

*Nexeo*, 364 NLRB No. 44, slip op. at 5–6 (footnote omitted). Two things stand out about this explanation, each of which demonstrates that this new, *Nexeo* test conflicts with and cannot survive scrutiny under Court and Board precedent.

First, the *Nexeo* test makes no mention of – effectively eliminating it – the first part of the *Spruce Up* test that restricts the perfectly clear caveat "to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment." *Spruce Up,* 209 NLRB at 195. Removing that prong stands the *Spruce Up* test – a test meant to reflect the narrow scope of the perfectly clear caveat – on its head. The presumption is that a successor has the right unilaterally to establish initial terms and conditions of employment in extending offers of employment to its predecessor's employees. The first prong of the test reflects that the presumption may be overcome by evidence that a successor, by word or deed, misled the predecessor's employees, whether intentionally or not, before or at the time it offered them positions that it would employ them under existing terms and conditions of employment.

Second, the *Nexeo* test changes the second prong of the *Spruce Up* test by moving the point in time for making the assessment whether the successor announced an intent to establish new terms and conditions of employment from

"prior to [the successor's] inviting former employees to accept employment," *Spruce Up,* 209 NLRB at 195, to "prior to, or simultaneously with, its expression of intent to retain the predecessor's employees." *Nexeo,* 364 NLRB No. 44, pp.5-6. Under the test, as demonstrated by how the Board applied it here, months before a successor (or as the Board would have it, a prospective successor) invites its predecessor's employees to apply for employment, the successor becomes a perfectly clear successor by expressing an interest in hiring the predecessor's employees, without clearly articulating, even if it may not yet know, that it intends to establish new terms and conditions of employment. The test effectively renders immaterial the question whether the successor misled the predecessor's employees things were not going to change – if a successor fails to clearly announce an intent to establish new terms and conditions of employment the first time it communicates with the predecessor's employees about its hiring plans, it becomes a perfectly clear successor. Under the test, the onus shifts to a successor to communicate to the predecessor's employees from the outset a clear intent to establish new terms and conditions of employment.

These changes fundamentally alter the *Spruce Up* test in ways that effectively overrule the test. Yet, the Board neither acknowledged that the *Nexeo* test materially changed the *Spruce Up* test nor offered the requisite analysis and explanation for departing from over 30 years of precedent. If this sounds familiar, it is because this case amounts to a *S&F Market Street* redux. *S&F Market Street*

*Healthcare LLC v. NLRB,* 570 F.3d 354 (D.C. Cir. 2009).

In *S&F Market Street,* this Court granted a petition for review and denied enforcement of a Board order finding that the employer, a nursing home operator, by failing to announce its intent to establish new terms and conditions of employment prior to inviting the predecessor's employees to accept employment, became a perfectly clear successor and, as such, violated its duty to bargain with the union over new terms and conditions of employment that it implemented upon commencing operations. The Court's discussion of the nature of the perfectly clear caveat and its application to the facts before it fit equally well here.

Based upon the Supreme Court's enunciation of the perfectly clear caveat in *Burns*, the Court began its analysis by explaining that, "the 'perfectly clear' exception is and must remain a narrow one because it conflicts with the 'congressional policy manifest in the Act ... to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.'" 570 F.3d at 359, quoting *Burns, 407 U.S.* at 288. After outlining the test adopted by the Board in *Spruce Up,* the Court then said, "at bottom, the 'perfectly clear' exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees misled or lulled into not looking for other work." 570 F. 3d at 359.

On the question of what it takes for a successor to avoid misleading or lulling the predecessor's employees not to look for other work, the Court, citing the

Board's decision in *Ridgewell's, Inc.,* 334 NLRB 37 (2001), enfd 38 Fed Appx 29 (D.C. Cir. 2002) found that all a successor need do is communicate information to the employees that portends employment on different terms. Applying that standard, the Court found that the Board's finding that S&F failed to announce its intent to establish new employment terms before it invited the predecessor's employees to accept employment was not supported by substantial evidence. The Court found that no "no employee could have failed to appreciate that significant changes were afoot" based upon the contents of a cover letter to each job application that "foretold 'significant operational changes,' identified various pre-employment checks and tests to be passed, and explained that any employment offered would be both temporary and at will." 570 F.3d at 359-60.

The Court also found that the Board "misread *Burns* to require more from the successor employer than a portent of employment under different terms and conditions," reiterating that "the 'perfectly clear' exception only applies to cases in which the successor employer has led the predecessor's employees to believe their employment status would continue unchanged after accepting employment with the successor." 570 F.3d at 360. On that point, the Court found:

> [T]he Board's holding achieves precisely what *Burns* and *Spruce Up* sought to avoid. In those cases the Supreme Court and the Board respectively started from the presumption that a successor employer may set its own terms and conditions of employment and reserved the "perfectly clear" exception for cases in which employees had been misled into believing their terms and conditions would continue unchanged. *See Burns,* 406 U.S. at 294-95; *Spruce Up,* 209 N.L.R.B.

> at 209. In this case, the Board presumed the predecessor's terms and conditions must remain in effect unless the successor employer specifically announces it will change "core" terms and conditions. Thus does the exception in *Burns* swallow the rule in *Burns*. Under the proper standard, S&F clearly comes within the protection of the rule rather than the straightjacket of the exception: It was never "perfectly clear that the new employer plan[ned] to retain all of the employees in the unit," *Burns,* 406 U.S. at 294-95, let alone that it did so "with no notice that they would be expected to work under new and different terms," *Spruce Up,* 209 N.L.R.B. at 195 n.7. On the contrary, the Company announced it would retain only those who met certain pre-employment tests and stated its intent to set new initial terms and conditions of employment.

570 F.3d at 361-62.

Like the standard the Board used in *S&F Market,* the *Nexeo* test erroneously presumes a predecessor's terms and conditions remain in effect unless the successor expressly announces employment will be conditioned on acceptance of new terms. It has things backwards. As such, the test fails scrutiny under *Burns, S&F Market* and *Spruce Up.* The proper test, one supported by a host of Board decisions, remains whether prior to inviting the District's employees to apply for employment, First Student provided them information that portended employment under different terms. The ALJ correctly found that the Company did so.

The case that is closest to being directly on point is *Banknote Corp. of America,* 315 NLRB 1041 (1994), enfd. 84 F.3d 637 (2d Cir. 1996). In *Banknote*, over three months after entering into an agreement to purchase a production facility, the respondent sent a letter to unions that represented the employees of the predecessor, informing them it "intended to attempt to hire its initial work force

from the employees currently working at the [facility], but that it was not making a commitment to recognize the Unions or be bound by their collective-bargaining agreements with [the predecessor.]" 315 NLRB at 1041. In rejecting the General Counsel's claim that the respondent was a perfectly clear successor, the Board found that the letter "effectively announced that [the respondent] would be instituting new terms and conditions of employment." 315 NLRB at 1043.

In *Marriott Management Services, Inc.,* 318 NLRB 144 (1995), the Board arrived at the same result in a case involving a verbal statement by the successor to the predecessor's employees' union representative that, "although the Respondent would recognize [the union], it would not adopt the extant collective-bargaining agreement." The Board found that the respondent "clearly announced its intent to establish a new set of conditions prior to inviting former employees to accept employment." 318 NLRB at 144, quoting *Spruce Up,* 209 NLRB at 195.

The cases, thus, teach that a successor can avoid perfectly clear successor status by simply communicating that it is not going to adopt or be bound by the predecessor's collective bargaining agreement. What Meek told the District's employees at the March 2, 2012, meeting cleared that bar and insulated First Student from being found to be a perfectly clear successor. *See also, Bekins Moving &Storage Co.,* 330 NLRB 761 (2000); *Planned Building Services, Inc.,* 318 NLRB 1049 (1995); *Henry M. Hald High School Assn.,* 213 NLRB 415 (1974).

### E. The Board's Decision Must Be Vacated Because First Student Timely Exercised Its Right To Establish New Terms Of Employment

The Board misapplied *Spruce Up* in finding that once First Student's perfectly clear successor status was triggered, the Company could not undo its status when it communicated to the employees at the May 17, 2012, meeting the terms under which it was offering employment. 366 NLRB No. 13, p.4. The Board erred in two respects.

First, under the first prong of the *Spruce Up* test, nothing Meek said at the March 2, 2012, meeting with the District's employees, or Kinsley said at and after the May 16, 2012, Board of Education meeting was found, or could have been found, to have misled the employees that First Student planned to retain the employees under the terms and conditions under which they worked under the District CBA.

Second, applying the second prong of the *Spruce Up* test, the Company, in inviting the District's employees to apply for employment at the May 17, 2012 meeting, timely announced, as found by the ALJ, the initial terms and conditions under which it would offer employment to those who satisfied its protocols. *See S&F Market Street,* 570 F.3d at 450 (because S&F's letter offering employment to the predecessor's employees under new terms of employment "was the very instrument by which the Company invited employees to accept employment with S&F, it was necessarily received 'prior to inviting form employees to accept

employment,'" under the second prong of *Spruce Up); see also, Peters v. NLRB,* 153 F.3d 289, 298 (6th Cir. 1998) ("[T]he employer may set initial terms of employment without first consulting the bargaining unit representative under two circumstances. The employer may set initial terms (1) if it has not, by "tacit inference" misled the employees into believing that prior working conditions will remain stable, or (2) if it has affirmatively announced its intention to retain the employees under new employment conditions before or immediately after commencing operations."); *Nazareth Regional High School,* 549 F.2d 873, 881 (2d Cir. 1976) ("The important consideration in determining whether it is perfectly clear that a successor intends to retain all of the employees is whether they have all been promised re-employment on the existing terms. Because Nazareth never at any time led the lay faculty to believe that they would be retained at the existing terms, it was free to fix the initial terms of employment….").

## VI. CONCLUSION

For all of the foregoing reasons, First Student respectfully requests that the Court grant the Company's Petition for Review, and deny enforcement of the Board's Decision.

Respectfully submitted,

*s/David A. Kadela*

David A. Kadela (D.C. Cir. No. 53959)
Littler Mendelson, P.C.
21 E. State St., Suite 1600
Columbus, OH 43215
Telephone: 614.463.4211
Facsimile: 614.221.3301
dkadela@littler.com

Attorney for Petitioner/Cross-Respondent
First Student, Inc.

## CERTIFICATE OF COMPLIANCE

I, David A. Kadela, do hereby certify that this brief complies with Rule 32(a)(5) and (7)(B) of the Federal Rules of Appellate procedure. The brief utilizes a 14-point proportionally spaced face for text. The brief contains 7,946 words according to Microsoft Office Word 2003, the word-processing system used to prepare the brief.

Dated: November 5, 2018

Respectfully submitted,

*s/David A. Kadela*
David A. Kadela
Littler Mendelson, P.C.

Attorney for Petitioner/Cross-Respondent
DHL Express, Inc.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing *Brief of Petitioner/Cross-Respondent First Student, Inc.* was electronically filed on this 5th day of November 2018. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic filing system.

*s/David A. Kadela*
David A. Kadela

Attorney for Petitioner/Cross-Respondent
First Student, Inc.